BACKGROUND TO 2007 CHANGES TO WETLAND APPEALS REGULATIONS

1. Introduction

MassDEP typically receives more than 80 wetlands appeals each year. Many of these cases are resolved within 6 months through settlement and prescreening conferences. Many take more than a year to resolve. On March 1, 2007, Governor Patrick directed MassDEP to reform the wetlands appeals process to allow for more timely action on these appeals, without reducing the level of environmental protection. The revisions to the appeal process explained below keep those parts that work well; prescreening, prefiled testimony and prior participation. But the revisions also make several fundamental changes by limiting the parties who can initiate an appeal, requiring parties to present their evidence early in the proceedings, and establishing a 6 month deadline for the appeal to be resolved. In addition, once these new regulations are in place, MassDEP will hear and decide these appeals in-house using its experienced staff and counsel, retaining the option to transfer cases to the Division of Administrative Law Appeals, on a case-by-case basis where timely resolution of a matter will benefit from DALA's assistance.

2. Background

Following what for many projects is an already time-consuming and thorough review by a local conservation commission MassDEP handles review of wetlands decisions through a three-step process. First, a MassDEP regional staff person typically conducts an informal site visit, reviews documents, and issues a superseding decision. Second, a landowner, abutter, aggrieved person, ten resident group, or conservation commission can appeal the regional decision, requesting an adjudicatory hearing consistent with the procedures set out in M.G.L. c. 30A and 310 CMR 1.00. An appeal is prescreened at MassDEP by a Presiding Officer who attempts to resolve the matter within 90 days. If an appeal is not resolved during this time period the appeal is transferred to the Division of Administrative Law Appeals (DALA). A DALA magistrate presides over a formal, "trial-type hearing" in which witnesses present testimony under oath and are subject to cross-examination. After the hearing is concluded, the magistrate issues a Recommended Decision. Third, the Commissioner reviews the magistrate's Recommended Decision, and either issues the Decision as written, clarifies legal findings, overturns it, or sends it back to the magistrate for further fact-finding. When the Commissioner issues her Final Decision, the permit is final and effective.

There is general consensus that the second step of this process, the trial-type proceeding, often causes significant permitting delays and diverts MassDEP staff time that could be spent on other pressing priorities. It also provides some opponents of a project with an opportunity to defeat it through additional delay and expense, rather than on the merits.

MassDEP and the Executive Office of Energy and Environmental Affairs (EOEEA) convened an advisory group chaired by the general counsels of MassDEP and

EOEEA, that consisted of attorneys with substantial experience in wetland proceedings. The committee considered ways of simplifying the procedures as well as an array of potential reforms.

2. The Legal Framework

The Wetlands Protection Act, G.L. c. 131, section 40, requires an applicant that seeks to work in or near wetlands to file a Notice of Intent with the local conservation commission, and to obtain an Order of Conditions before proceeding with the work. The Act mandates that the local conservation commission provide notice and a hearing before issuing a decision. The Act also allows the applicant, an aggrieved person, an abutter, a "ten resident" group, or the Department itself to request a superseding order from the Department. However, the Act does not require MassDEP to hold a hearing prior to issuing a superseding decision, and clearly does not require MassDEP to conduct a trial-type hearing before issuing a Final Decision.

Also relevant to the legal inquiry is the State Administrative Procedures Act, G.L. c. 30A. That statute defines an "adjudicatory proceeding" as "a proceeding before a [state] agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined, after opportunity for agency hearing."

Neither the Wetland Protection Act nor any other statute requires MassDEP to hold a hearing before issuing a superseding decision on a wetlands matter. Thus, the only relevant legal question is whether a constitutional provision requires such a hearing. An extensive review of Chapter 30A and case law indicates that there is no constitutional requirement that MassDEP hold a hearing for an appeal brought by a nonaggrieved-abutter, a conservation commission, or a ten resident group. Case law provides no clear answer as to whether a hearing is constitutionally required for an appeal brought by an applicant or a person who is aggrieved by a decision. However, as a policy matter MassDEP believes that providing a hearing in such instances is consistent with common law principles. See *Yerardi's Moody Street Restaurant v. Board of Selectmen of Randolph*, 19 Mass. App. Ct. 296, 303 (1985) ("in this Commonwealth the right to a hearing where government exerts power upon an individual in a matter of consequence has been related, on occasion, not strictly to the Constitution, but to an ethic that pervades our legal system.")

4. The Reform

The comprehensive reform contained in the 2007 regulations is intended to accomplish three principal results.

First, the new regulations change the policy of allowing persons with no legal standing to bring appeals. Under the current system, persons or entities with no legal standing to request an adjudicatory hearing (*e.g.*, abutters, ten resident groups, conservation commissions) are allowed to do so as of right. Under the new regulations,

only an applicant who filed the notice of intent, an aggrieved person, and a conservation commission may file an appeal. While not legally required, the new regulations continue to allow conservation commissions to initiate appeals. Conservation commissions play a very important role in the implementation of the Wetlands Protection Act and have a stake in the outcome of cases that they have ruled upon. The regulations also allow a group of ten residents, or a person who may be aggrieved by the outcome of the appeal to intervene in an appeal.

Second, the new regulations require the appealing party and other parties to submit their evidence early in the process. Under the current system, the appealing party must file a Claim for an Adjudicatory Appeal, and the claim is deemed sufficient if it identifies in general terms the grounds for the appeal so as to give notice as to what issues are in dispute. The claimant does not have to submit evidence to support the claim until later in the process, and the claim can only be dismissed if, assuming all facts alleged in the claim are true, the claimant is not entitled to relief as a matter of law. As a result, an appeal that is not resolved in prescreening may take many months before a lack of evidentiary support is brought to light and results in the termination of the appeal.

The new regulations fundamentally change this practice for wetlands appeals. Under the new regulations, an appealing party must present its case in two parts. First, a party must file notice of the appeal, similar to a Claim filed today. Within approximately two and one half months of the filing of the appeal, the appealing party must submit its "direct case." The direct case must identify the factual and legal bases for the appeal, *and must contain all of the evidentiary support for the appeal.* The regulations also establish timelines for other parties to submit their direct cases, and for parties to submit rebuttal testimony. This deadline for filing the direct case is reasonable, given that the appealing party will have had the opportunity to learn about the project at the local conservation commission stage and the superseding decision stage, and line up outside assistance during that typically lengthy time period. To ensure that the process is fair for opponents of the project, the new regulations mandate that the applicant provide information about the project, and allow a site visit, within five days of a request.

This reform promotes several important objectives. First, it reduces the incentive to file an appeal that lacks a sound factual and legal basis. Second, it ensures that all parties know what the disputed issues are at an early stage in the process, which facilitates settlement and hearing preparation. Third, it enables the hearing to be short and productive, and focused primarily on cross-examination.

Third, the new regulations establish that wetland appeals will be resolved within six months, rather than the current practice of one year or more. In order to achieve the six-month goal, the regulations include presumptive timelines for the major events of the appeal, and other efficiencies, such as issuing notice of the hearing date as soon as the appeal is filed, rather than scheduling the date many months into the process.

There are three existing components of the appeal process that are built into the 6-month wetlands appeal process. Prescreening will continue to be utilized, and by

regulation will be scheduled 30 days after the appeal is filed. Prefiled testimony will also be maintained, in the form of the parties' "direct case" described below, due 45 days after the prescreening in any matter not resolved in prescreening. This practice will allow the presiding officer to identify issues, settle or resolve a case before parties have invested time and effort in supporting their case, or to set a schedule for hearing if the case is not resolved. The hearing will occur approximately 120 days after the appeal is filed, with a final decision from the Commissioner coming approximately two months later. The requirement of prior participation in the Conservation Commission or MassDEP regional proceeding will also be retained to ensure that parties have made reasonable effort to exhaust all remedies.

By keeping what works and revising what does not, these reforms will ensure that parties who have legal standing to appeal will be heard, parties will have to provide their evidence early in the process, and Final Decisions will be issued within 6 months of the appealed decision.

5. **Pending Cases**

MassDEP has discussed the status of pending cases at DALA with senior staff of the Executive Office for Administration and Finance. A&F has informed MassDEP that it will work with DALA to expedite the resolution of pending cases.

6. Notes to Reviewers

Appellants: This proposal limits those parties who can initiate an appeal. That group includes applicants, property owners (including easement holders), and persons aggrieved. Due to conservation commission's interest and significant role in the process, a conservation commission may also initiate an appeal. 10 residents may seek to intervene in an appeal, once another party initiates it. We are interested in comments on this change in process.

Timeline: The practical effect of having a 6-month timeline in the regulation will be that parties will need to seriously explore settlement opportunities in advance of prescreening and at prescreening. Parties will be required to present their full cases early in the process, but they will not have to do so until 45 days after the prescreening. Our goal in breaking out the timeline in this manner is to front load settlement opportunities followed shortly there after with presentation of a parties' case when a case does not settle. Settlement is not precluded at a later time, but later settlement will not enable the parties to delay moving forward to hearing. We are interested in comments on whether draft regulation breaks down the timelines as effectively as possible for most cases.

Document Requests: These regulations provide that the applicant will make their file available to parties within 5 days of a request. This addition to the regulations reflects the expedited nature of the appeal timeline and seeks to take advantage of the fact that the applicant, will have the relevant documents available. We are interested in comments on whether an applicant could make the files available in this amount of time.